A

Loh Liang Gun & Anor v Public Prosecutor

COURT OF APPEAL (PUTRAJAYA) — CRIMINAL APPEAL NOS P–09–26 OF 2000 & P–09–13 OF 2004

B TENGKU BAHARUDIN, LOW HOP BING AND RAUS SHARIF JJCA

15 JUNE 2007

Criminal Law — Cheating — Dishonestly inducing payment of hire purchase payments

C *based on falsely represented proposal forms — Defence of pre-approval — Penal Code s 420*

Criminal Law — Cheating — Abetment — Whether judge should have amend charges

under s 109 to charges under s 107 of the Penal Code — Whether abetment proved

D

Criminal Procedure — Prosecution — Prima facie case — Case prior to amendment to s 173(f) Criminal Procedure Code — Whether judge applied the right test at the end of prosecution case

E

The first appellant was a marketing officer of Hong Leong Finance and it was his duty to interview hire purchase applicants to ensure that their particulars in the proposal forms were correct. The first appellant was charged for the offence of

F cheating by dishonestly inducing the staff of Hong Leong Finance to believe that the particulars contained in 10 sets of proposal forms for hire purchase loans for vehicles in the applicants' names respectively were true and correct and to deliver 10 payments totalling RM440,000 to Shen Hua Used Car Trading Co ('the used car company'), which belonged to the second appellant. It was alleged that the first appellant had by his recommendations on the proposal forms falsely represented to Hong Leong

G Finance that all the particulars provided by the first appellant had been checked and verified by him to be true and correct. It was further alleged that acting upon the first appellant's recommendations and false representations, Hong Leong Finance through the branch manager (PW3) had been induced and had approved the hire-purchase loans. Both appellants were convicted and sentenced by the George Town Sessions

H Court judge ('the trial judge'). Their appeals to the Penang High Court judge had been dismissed. Thus their appeals before this court.

The first appellant's counsel submitted that for the 10 charges against the first appellant relating to the incidents in 1990, the applicable law was that prior to the amendment to s 173(f) of the Criminal Procedure Code ('CPC'), and the trial judge

I would have to conduct a maximum evaluation of the evidence led by the prosecution and be satisfied that the prosecution had established its case beyond reasonable doubt, before the first appellant could be called upon to enter his defence, but the trial judge had applied the prima facie standard which was the wrong test. It was also argued for the second appellant that the trial judge should have invoked s 158 of the CPC to amend the charges under s 109 to charges under s 107 of the Penal Code.

It was further canvassed for the second appellant that apart from the evidence that the monies have been delivered to the second appellant's bank account, there was nothing to incriminate him since photocopies of the invoices were not admissible.

Held, dismissing both appeals against convictions:

(1) The trial judge has considered the sufficiency of evidence and applied the standard of proof beyond any reasonable doubt before he ordered the first appellant to enter his defence. Therefore there was no error or miscarriage of justice (see para 31).

(2) There was overwhelming evidence to show that the prosecution had proved all the charges against both the appellants beyond reasonable doubt and in both the courts below, there was no misdirection of law relating to the standard of proof. The appellants had not suffered any prejudice. They had not been denied a fair trial (see para 34).

(3) Although the first appellant had mounted an incisive cross-examination of PW3, the issue of PW3's pre-approval had never been posed or suggested to PW3. Both the courts below found no evidence of pre-approval whatsoever. Therefore, both the courts below had very carefully considered and correctly rejected the first appellant's defence of pre-approval (see paras 38 & 42).

(4) The abetment charges against the second appellant were preferred under s 109 read with s 420 in order to include the punishment to be meted out for the offence of abetment. The defence contention that the abetment charges should be amended from s 109 to s 107 was indeed unsustainable. A careful reading of these two sections clearly shows that each and every circumstance contained in s 107 as constituting abetment has also been incorporated in the explanation to s 109. Section 109 and the explanation thereto must be read as a whole, ie in conjunction and not in isolation. There can be no question of amending the abetment charges from s 109 to s 107 when these two sections refer to identical circumstances. The amendment raised in the defence contention, if sustained, would have resulted in the accused not being informed of the punishment under s 109. That would have deprived the second appellant of the opportunity of knowing fully the maximum sentence provided for the offences with which he has been charged, and certainly would have run counter to the fundamental rules of natural justice (see paras 45, 47–48).

(5) The second appellant had provided the first appellant with invoices bearing the letterhead of the used car company of which the second appellant was the sole proprietor. As the second appellant was the maker and author of these invoices, they were clearly admissible (see para 53).

(6) The purpose of the invoices was to secure hire purchase loans from Hong Leong Finance. There was overwhelming evidence of abetment, in that the second appellant by making and providing these invoices had intentionally aided the first appellant in the commission of the offences of cheating. The second appellant's conduct clearly came within the ambit of abetment as defined in s 107(c) and also the third limb of the explanation to s 109 (see para 54).

(7) In relation to his own invoices, the second appellant had not even made a feeble attempt to cross-examine prosecution witnesses especially PW3. This would amount to an acceptance of their testimonies. The second appellant could not be heard to say that these invoices issued by him were inadmissible. This defence contention had been correctly dismissed by both the courts below (see para 55).

[Bahasa Malaysia summary

Perayu pertama adalah pegawai pemasaran Hong Leong Finance dan adalah tugas beliau untuk menemuduga pemohon sewa beli bagi memastikan bahawa butiran mereka di dalam borang usul adalah benar. Perayu pertama telah didakwa atas kesalahan penipuan secara tidak jujur mendorong kakitangan Hong Leong Finance untuk mempercayai bahawa butiran yang terdapat di dalam 10 set borang usul untuk pinjaman sewa beli kenderaan di dalam nama-nama pemohon masing-masing adalah benar dan betul dan untuk menghantar 10 pembayaran yang berjumlah RM440,000 kepada Shen Hua Used Car Trading Co ('syarikat kereta terpakai'), yang dimiliki oleh perayu kedua. Dikatakan bahawa perayu pertama telah melalui nasihatnya dalam borang usul secara salahnya menggambarkan kepada Hong Leong Finance bahawa keseluruhan butiran-butiran yang telah disediakan oleh perayu pertama telah diperiksa dan disahkan oleh beliau adalah betul dan benar. Selanjutnya dinyatakan bahawa bertindak daripada nasihat perayu pertama dan nyataan palsu, Hong Leong Finance melalui pengurus cawangan (PW3) telah didorong dan telah meluluskan pinjaman sewa beli. Kedua-dua perayu telah disabitkan dan dihukum oleh hakim Mahkamah Sesyen George Town ('hakim bicara'). Rayuan mereka ke hakim Mahkamah Tinggi Pulau Pinang telah ditolak. Oleh itu mereka merayu ke mahkamah ini.

Peguam perayu pertama menghujahkan bahawa 10 pertuduhan terhadap perayu pertama berkenaan dengan kejadian pada 1990, undang-undang terpakai adalah sebelum pindaan s 173(f) Kanun Tatacara Jenayah ('KTJ'), dan hakim bicara perlu melaksanakan penilaian yang maksimum terhadap bukti yang ditunjukkan oleh pendakwa dan berpuas hati bahawa pendakwa telah membuktikan kesnya melangkaui batas keraguan, sebelum perayu pertama dipanggil untuk memasukkan pembelaannya, tetapi hakim bicara telah menggunakan penilaian prima facie yang mana adalah percubaan yang salah. Adalah dinyatakan juga bahawa untuk perayu kedua bahawa hakim bicara seharusnya menggunakan s 158 KTJ untuk meminda pertuduhan di bawah s 109 kepada pertuduhan di bawah s 107 Kanun Keseksaan. Adalah rayuan selanjutnya bagi perayu kedua bahawa kecuali daripada bukti bahawa wang telah pun dihantar kepada akaun bank perayu kedua, tidak terdapat langsung yang menunjukkannya bersalah apabila salinan invois adalah tidak diterima.

Diputuskan, menolak kedua-dua rayuan terhadap sabitan:

(1) Hakim bicara telah mempertimbangkan cukupnya bukti dan menggunakan standard pembuktian melangkaui mana-mana keraguan yang munasabah sebelum beliau memerintahkan defendan pertama memasukkan pembelaannya. Oleh itu tidak terdapatnya kesilapan atau kesilapan mahkamah (lihat perenggan 31).

(2) Terdapatnya bukti yang sangat penting untuk menunjukkan bahawa pendakwaan telah membuktikan kesemua pertuduhan terhadap kedua-dua perayu melangkaui batas keraguan dan di dalam kedua-dua mahkamah di bawah, tidak terdapatnya penyalaharahan undang-undang berkenaan dengan standard pembuktian. Perayu-perayu tidak menanggung apa-apa prejudis. Mereka tidak dinafikan satu perbicaraan yang adil (lihat perenggan 34).

(3) Walaupun perayu pertama telah menjalankan pemeriksaan balas yang begitu memberangsangkan terhadap PW3, isu kelulusan awal tidak pernah ditimbulkan atau dicadangkan kepada PW3. Kedua-dua mahkamah terdahulu mendapati tidak terdapat keterangan berkenaan kelulusan awal atau apa-apa pun. Oleh itu, kedua-dua mahkamah di bawah telah dengan penuh hati-hati mempertimbangkan dan dengan benarnya menolak pembelaan kelulusan awal perayu pertama (lihat perenggan 38 & 42).

(4) Pertuduhan subahat terhadap perayu kedua adalah dibuat di bawah s 109 yang dibaca bersama dengan s 420 untuk memasukkan hukuman bagi kesalahan subahat. Pembelaan menyatakan bahawa pertuduhan subahat seharusnya dipinda daripada s 109 kepada s 107 adalah tidak dapat disokong sama sekali. Jika dibaca dengan teliti kedua-dua seksyen ini dengan jelasnya menunjukkan bahawa setiap satu dan kesemua keadaan terkandung di dalam s 107 yang membentuk subahat juga telah digabungkan di dalam penjelasan kepada s 109. Seksyen 109 dan penjelasan tersebut perlu dibaca secara menyeluruh, iaitu secara bersama dan bukannya secara berasingan. Tidak terdapat persoalan untuk meminda pertuduhan bersubahat daripada s 109 kepada s 107 apabila kedua-dua seksyen ini merujuk kepada keadaan-keadaan yang serupa. Pindaan yang ditimbulkan di dalam pembelaan, jika bertahan, akan menyebabkan tertuduh tidak dimaklumkan berkenaan dengan hukuman di bawah s 109. Ini akan menghalang perayu kedua akan peluangnya untuk mengetahui sepenuhnya hukuman maksimum yang diperuntukkan untuk kesalahan yang mana beliau didakwa, dan sudah tentu menyebabkan pertentangan kepada undang-undang asas kepada keadilan asasi (lihat perenggan 45, 47–48).

(5) Perayu kedua telah menyediakan perayu pertama dengan invois-invois yang tertera kepalasurat syarikat kereta terpakai yang mana perayu kedua adalah pemilik tunggal. Sebagai perayu kedua adalah pembuat dan penulis invois-invois ini, semua dengan jelasnya boleh diterima (lihat perenggan 53).

(6) Tujuan invois-invois adalan untuk menjamin sewa beli daripada Hong Leong Finance. Terdapatnya bukti yang sangat penting berkenaan dengan subahat, oleh itu perayu kedua dengan membuat dan menyediakan invois-invois ini mempunyai niat membantu perayu pertama dalam perbuatan melakukan kesalahan menipu. Tindakan perayu kedua dengan jelasnya termasuk di dalam lingkungan subahat seperti mana didefinasikan di dalam s 107(c) dan juga bahagian ketiga huraian kepada s 109 (lihat perenggan 54).

(7) Berkaitan dengan invois-invoisnya sendiri, perayu kedua tidak berbuat apa-apa walaupun cubaan lemah untuk memeriksa balas saksi-saksi pendakwa terutama PW3. Ini mendorong kepada kebolehterimaan testimoni mereka.

Perayu kedua tidak boleh didengar menyatakan bahawa invois-invois ini dikeluarkan olehnya adalah tidak boleh diterima. Pernyataan pembelaan ini telah dengan betulnya ditolak oleh kedua-dua mahkamah di bawah (lihat perenggan 55).]

Notes

For a case on cheating generally, see 4 *Mallal's Digest* (4th Ed, 2003 Reissue) para 34.
For cases on prima facie case, see 5(2) *Mallal's Digest* (4th Ed, 2004 Reissue) paras 2789–2797.

Cases referred to

Arulpragasan a/l Sandaraju v PP [1997] 1 MLJ 1 (refd)
Bhandulananda Jayatilake v Public Prosecutor [1982] MLJ 83 (refd)
DP Vijandran v PP [1999] 1 MLJ 385 (refd)
Datuk Sahar bin Arpan v Public Prosecutor [2007] 1 MLJ 697 (refd)
Dalip Bhagwan Singh v PP [1998] 1 MLJ 1 (refd)
K Saravanan S Karupiah v PP [2002] 4 CLJ 144 (refd)
PP v Abang Abdul Rahman [1982] 1 MLJ 346 (refd)
PP v Ishak bin Haji Shaari and other appeals [2003] 4 MLJ 585 (refd)
PP v Lawrence Tan Hui Seng [1993] 4 CLJ 221 (refd)
PP v Mohd Radzi bin Abu Bakar [2005] 6 MLJ 393 (refd)
PP v Munusamy [1980] 2 MLJ 133 (refd)
PP v Norazam bin Ibrahim [2006] 3 AMR 524 (refd)
Rosli Supardi v PP [2002] 3 MLJ 256 (refd)
Transport Ministry v Garry [1973] 1 NZLR 120 (refd)
Tunde Apatira & Ors v PP [2001] 1 MLJ 259 (refd)
Wong Swee Chin v PP [1981] 1 MLJ 212 (refd)

Legislation referred to

Courts of Judicature Act 1964 s 60(1)
Criminal Procedure Code ss 158, 173(f), 180, 422
Penal Code ss 24, 107, 109, 420

Karpal Singh (Jagdeep Singh Deo with him) (Karpal Singh & Co) for the first apellant.
K Kumarendran (A Athimulan with him) (Kumar & Co) for the second appellant.
Manoj Kurup (Deputy Public Prosecutor) for the respondent.

Low Hop Bing JCA (delivering judgment of the court):

APPEALS

[1] Both the appellants have been convicted and sentenced by the George Town Sessions Court judge ('the trial judge'). Their appeals to the Penang High Court judge have been dismissed. They have now lodged their appeals before this court. Particulars of the appellants and the orders against which they have appealed are:

First Appellant

Loh Liang Gun in Court of Appeal Criminal Appeal No P–09–26–2000 ('the first appellant)

Orders appealed against

Convicted on 10 counts of cheating under s 420 of the Penal Code and sentenced to four years imprisonment on each of the first five counts; and five years imprisonment each on the rest, all the 10 sentences to run concurrently.

Second Appellant

Kung Lye Huat in Court of Appeal Criminal Appeal No P–09–13–2004 ('the second appellant')

Orders appealed against

Convicted on nine counts of abetting the first appellant, punishable under s 109 of the Penal Code and sentenced to two years imprisonment on each of the first four counts; and three years each on the other counts, all the nine sentences to run concurrently.

[2] The ten charges preferred against the first appellant concerned the offence of cheating Hong Leong Finance Bhd at No 54, Jalan Dato Keramat, Pulau Pinang ('Hong Leong Finance') by dishonestly inducing the staff of Hong Leong Finance to believe that the particulars contained in ten sets of proposal forms for hire purchase loans for vehicles in the applicants' names respectively were true and correct and to deliver ten payments totalling RM440,000 to Shen Hua Used Car Trading Co ('the used car company'). The other relevant particulars of the charges are best tabulated as follows:

CHARGE	DATE	VEHICLE	EXHIBIT	AMOUNT (RM)
1	9.10.90	HONDA CIVIC	P 12	33,000
2	6.9.90	HONDA ACCORD	P 13	40,000
3	20.9.90	BENZ	P 14	50,000
4	14.9.90	BENZ	P 15	50,000
5	24.9.90	VOLVO 240	P 16	40,000
6	7.9.90	VOLVO 740	P 17	50,000
7	2.10.90	VOLVO 740	P 18	50,000
8	21.9.90	VOLVO 240	P 19	40,000
9	17.8.90	VOLVO 240	P 20	47,000
10	4.10.90	VOLVO 240	P 21	40,000
			Total	440,000

[3] The second appellant was charged with abetting the first appellant in the commission of the offences contained in charges 2 to 10 above.

[4] The prosecution has withdrawn the first abetment charge against the second appellant.

ESSENTIAL INGREDIENTS UNDER S 420 PENAL CODE

[5] For the purpose of sustaining the charges of cheating against the first appellant under s 420, the prosecution must establish the following ingredients:

(1) Hong Leong Finance *delivered property* (ie, the amount stated in the charges respectively) to another person (here, the second appellant);

(2) The first appellant *induced* Hong Leong Finance to deliver that property to the second appellant;

(3) Hong Leong Finance acted upon such inducement in consequence of the first appellant's *deceit*;

(4) The first appellant *acted dishonestly* in so inducing Hong Leong Finance to part with the property; and

(5) Hong Leong Finance suffered *damage or harm* as a result of the deceit.

DELIVERY OF PROPERTY

[6] This essential ingredient has been established when Hong Leong Finance delivered the total sum of RM440,000 representing the amount stated in the charges respectively, to the D & C Bank account of the second appellant ('the second appellant's bank account').

INDUCEMENT

[7] The audit manager (PW1) and the audit executive (PW2), both of the parent bank ie, Hong Leong Bank, gave unchallenged evidence that the first appellant's duties as a marketing officer of Hong Leong Finance were to interview the applicants to ensure that their particulars in the proposal forms were correct, to inspect the vehicles and verify them with the Road Transport Department, to visit the applicants at their respective addresses, to reject proposal forms from unqualified or ineligible applicants, and finally to submit the verified proposal forms with his recommendations to the branch manager (PW3). PW3 would not have given his approval to these applications in the proposal forms if the first appellant had not submitted them to PW3.

[8] The first appellant had by his recommendations on the proposal forms falsely represented to Hong Leong Finance that all the particulars provided by the first appellant had been checked and verified by him to be true and correct.

[9] Acting upon the first appellant's recommendations and false representations, Hong Leong Finance through PW3 had been induced and had approved the hire-purchase loans. That led to the delivery of the monies by Hong Leong Finance to the second appellant's bank account.

[10] There can be no doubt that the prosecution has established this essential ingredient.

DECEIT

[11] PW2 testified that the proposal forms stated that the first appellant had verified all the particulars therein including the applicants' addresses and occupations.

[12] PW3 testified that the first appellant must ensure that every process in the application for the hire-purchase loans was in good order. However, the particulars contained in all the proposal forms were false eg, the applicants and their addresses were non-existent, and the particulars purportedly derived from the applicants' identity cards belonged to people other than the holders thereof. Worst of all, some applicants were actually deceased. Some 'cars' stated in the proposal forms were actually motorcycles, and the owners thereof were people other than those stated therein.

[13] To say the least, the first appellant had completed the proposal forms with patently false particulars which he had purportedly checked and verified, thereby intentionally deceiving Hong Leong Finance into believing that all particulars were correct in order to procure the approval for the hire purchase loans which Hong Leong Finance would not have done had the truth been made known by the first appellant to Hong Leong Finance.

DISHONESTLY

[14] Section 24 of the Penal Code where relevant provides that whoever does anything with the intention of causing wrongful gain to one person, or wrongful loss to another person, is said to do that thing 'dishonestly'.

[15] The first appellant had completed the proposal forms with false particulars and given his recommendations which had induced the delivery of all the hire purchase loans amounting to RM440,000 by Hong Leong Finance to the second appellant. There was clearly a wrongful loss to Hong Leong Finance and a wrongful gain to the second appellant. The delivery of the sum of RM440,000 by Hong Leong Finance would not have been done had it not been for the acts of the first appellant. The first appellant had undoubtedly acted dishonestly within the meaning of s 24.

DAMAGE

[16] The damage which Hong Leong Finance has incurred as a result of the dishonest acts of the first appellant was indisputably the sum of RM440,000 which

had been delivered by Hong Leong Finance and credited to the second appellant's bank account.

ABETMENT UNDER S 109 PENAL CODE

[17] To sustain a charge of abetment against the second appellant under s 109, the prosecution has to prove that the second appellant had abetted the first appellant in the commission of the offence of cheating under s 420.

[18] The second appellant had played the role of providing the first appellant with invoices bearing the letterhead of the used car company of which the second appellant was the sole proprietor and stating that the vehicles were in his possession. The second appellant had issued these invoices for the purpose of procuring the hire purchase loans from Hong Leong Finance. He provided the connection between the invoices and the delivery of the various sums representing the hire purchase loans. The second appellant had used his bank account as a conduit to credit the delivery of the payments from Hong Leong Finance.

[19] The invoices were as good as documents of title in the used car business. The persons named in the invoices were the payees. There would have been no delivery of the hire purchase loans by Hong Leong Finance if the second appellant had not issued such invoices. It is significant to note that all the invoices were issued by the second appellant in the name of the Used Car Company for the purpose of procuring the delivery by Hong Leong Finance of nine payments as stated in the nine charges of abetment against the second appellant. The particulars in the invoices were false as the cars stated therein had never existed and no down-payment thereon had ever been made. All the nine payment vouchers revealed that payments were made by Hong Leong Finance and credited to the second appellant's bank account.

[20] In my view, abetment has been proved against the second appellant. I shall now examine the issues raised in this appeal.

STANDARD OF PROOF

[21] First appellant's learned counsel Mr Karpal Singh (Mr Jagdeep Singh Deo with him) submitted that for the 10 charges against the first appellant relating to the incidents in 1990, the applicable law was that prior to the amendment to s 173(f) of the Criminal Procedure Code ('CPC'), and the trial judge would have to conduct a maximum evaluation of the evidence led by the prosecution and be satisfied that the prosecution had established its case beyond reasonable doubt, before the first appellant could be called upon to enter his defence, but the trial judge had applied the prima facie standard which was the wrong test. Support was sought in *Arulpragasan a/l Sandaraju v Public Prosecutor* [1997] 1 MLJ 1 (FC); Dalip *Bhagwan Singh v Public Prosecutor* [1998] 1 MLJ 1 FC; and *Public Prosecutor v Mohd Radzi bin Abu Bakar* [2005] 6 MLJ 393 (FC).

[22] He added that there was a fundamental miscarriage of justice and s 422 of the CPC was of no assistance to the prosecution, citing *Public Prosecutor v Ishak bin Haji Shaari and other appeals* [2003] 4 MLJ 585 (CA); and *Tunde Apatira & Ors v Public Prosecutor* [2001] 1 MLJ 259 (CA). A

[23] The second appellants' learned counsel Datuk K Kumarendran (Mr A Athimulan with him) adopted the above submission. B

[24] Learned deputy public prosecutor Mr Manoj Kurup responded that at the close of the prosecution's case, the trial judge had applied the correct standard of proof in line with the same language used in *Ishak bin Haji Shaari*, and that the High Court judge at the stage of the intermediate appeal had correctly dismissed the above defence contention. He relied on *Rosli Supardi v Public Prosecutor* [2002] 3 MLJ 256 (CA); and *K Saravanan S Karupiah v Public Prosecutor* [2002] 4 CLJ 144 (CA). C

[25] In order to resolve this issue, I find it appropriate to consider the authorities cited for the defence. D

[26] In *Arulpragasan*, the Federal Court was asked to decide on the standard of proof required from the prosecution under the then s 180 of the CPC in order that a High Court judge may rule that there is a case for the accused to answer. The majority view of the Federal Court applied the usual criminal standard of proof, to wit, beyond all reasonable doubt which called for a maximum evaluation of evidence tendered by the prosecution, instead of the much lower standard of proof of a mere prima facie case which called for a minimal evaluation thereof. E

[27] A similar sentiment was expressed by the Federal Court in *Dalip Bhagwan Singh*, in relation to a summary criminal trial before a subordinate court under the then s 173(f) of the CPC. F

[28] In *Mohd Radzi bin Abu Bakar*, at p 398 para 4, Gopal Sri Ram JCA delivered the unanimous judgment of the Federal Court and explained as follows: G

> [4] In our respectful view, *Arulpragasan* is authority for the proposition that the test to be applied under the former ss 173(f) and 180 of the CPC is that the prosecution must establish its case beyond a reasonable doubt before an accused could be called upon to enter his defence. *It is not authority for the proposition that it is incumbent for a court to make a finding at the close of the prosecution's case that he was satisfied that the prosecution had proved its case beyond reasonable doubt. The failure by the trial court either to make or to record such a finding does not in our judgment occasion a miscarriage of justice. It is sufficient for the judicial arbiter — be he judge or magistrate — to give his reason in his written grounds of judgment for requiring an accused to make his defence.* (Emphasis added.) H

I

[29] In the light of the above Federal Court judgment, it is necessary for me to revert to the trial judge's written grounds of judgment which required the first appellant to enter his defence. The relevant portion of his written grounds of judgment is to be found at p 397 vol 3 of the appeal record which reads as follows:

Hence, I found that there was a case for A1 to answer on evidence that was, at that stage, beyond any reasonable doubt, for the offence of cheating.

[30] Given that backdrop, can the trial judge be said to have misdirected himself on the standard of proof?

[31] The trial judge has considered the sufficiency of evidence and applied the standard of proof beyond any reasonable doubt before he ordered the first appellant to enter his defence. I am therefore of the view that there was no error or miscarriage of justice, see *Ishak bin Haji Shaari*, per Mohd Noor Ahmad JCA (later FCJ).

[32] Be that as it may, it has been held that in an exceptional case, where the evidence is clear and cogent, an appellate court may affirm a conviction despite a misdirection: *Tunde Apatira*, which was followed by the Court of Appeal in *Rosli Supardi.*

[33] In *K Saravanan*, the Court of Appeal through the judgment Mohd Noor Ahmad JCA (later FCJ) held that if upon scrutiny of the whole evidence, there is overwhelming evidence to show that the prosecution has proved its case beyond reasonable doubt, the choice of the words *prima facie* was only the wrong usage of words, in which case, the Court of Appeal applied the proviso to s 60(1) of the Courts of Judicature Act 1964 and held that no substantial miscarriage of justice had occurred.

[34] Having carefully perused the volumes of evidence adduced at the trial, which I have analysed and crystallized above, I find that there is overwhelming evidence to show that the prosecution has proved all the charges against both the appellants herein beyond reasonable doubt and that in both the courts below, there was no misdirection of law relating to the standard of proof. The appellants have not suffered any prejudice. They have not been denied a fair trial.

DEFENCE OF PRE-APPROVAL

[35] It was argued for the first appellant that the transactions in question had in fact been pre-approved by PW3 and the first appellant merely filled in the particulars, as a result of which it could not be said that it was the first appellant's deceit which had caused the delivery of the monies in question.

[36] The prosecution asserted that the trial judge had correctly rejected the first appellant's defence of pre-approval and that rejection had been rightly affirmed by the High Court judge.

[37] In my judgment, the issue of whether there was pre-approval by PW3 is a question of mixed fact and law.

[38] It is to be noted that although the first appellant had mounted an incisive cross-examination of PW3, the issue of PW3's pre-approval had never been posed or suggested to PW3. Both the courts below found no evidence of pre-approval whatsoever.

[39] In fact, PW3 testified that the first appellant was at the material time the marketing officer dealing with and taking charge of these ten transactions. He gave his approval thereto on the basis of the first appellant's recommendations on the proposal forms which were completed and submitted by the first appellant. The first appellant had dishonestly entered a whole range of false particulars in the proposal forms for the purpose of deceiving Hong Leong Finance.

[40] The defence in the course of cross-examining PW3 had not challenged PW3 on this. I therefore hold that PW3's evidence in this regard must be deemed to have been accepted by the defence as uncontroverted. This proposition of law is supported by weighty authorities. In *Wong Swee Chin v Public Prosecutor* [1981] 1 MLJ 212 at p 213 right column C–F, Raja Azlan Shah CJ (Malaya) (now HRH the Sultan of Perak) held, inter alia, that:

> On this point, we need only say there is a general rule that failure to cross-examine a witness on a crucial part of the case will amount to an acceptance of the witness's testimony.

[41] The eminent learned Chief Justice also referred to the various exceptions set out in the judgment of the Supreme Court of New Zealand in *Transport Ministry v Garry* [1973] 1 NZLR 120, p 122, but those exceptions do not appear to have any application here (see also *Public Prosecutor v Abang Abdul Rahman* [1982] 1 MLJ 346 (HC), and *Public Prosecutor v Norazam bin Ibrahim* [2006] 3 AMR 524, p 530 (HC)).

[42] In my view, both the courts below have very carefully considered and correctly rejected the first appellant's defence of pre-approval.

ABETMENT CHARGES

[43] It was argued for the second appellant that the trial judge should have invoked s 158 of the CPC to amend the charges under s 109 to charges under s 107 of the Penal Code.

[44] The prosecution refuted the defence contention as baseless and added that no amendment is necessary. At the intermediate appeal, the High Court judge has seen it fit to dismiss the defence contention.

[45] In my judgment, the abetment charges against the second appellant were preferred under s 109 read with s 420 in order to include the punishment to be meted out for the offence of abetment which is prescribed and contained in s 109 in the following words:

A 109. Punishment of abetment if the act abetted is committed in consequence, and where no express provision is made for its punishment.

Whoever abets any offence shall, if the act abetted is committed in consequence of the abetment, and no express provision is made by this Code for the punishment of such abetment, be punished with the punishment provided for the offence.

B

Explanation – An act or offence is said to be committed in consequence of abetment, when it is committed in consequence of the instigation, or in pursuance of the conspiracy, or with the aid which constitutes the abetment.

C **[46]** Section 107 on the other hand does not provide for any punishment but instead sets out each and every circumstance in which the offence of abetment may be committed. It reads as follows:

107. Abetment of a thing.

D

A person abets the doing of a thing who —

(a) instigates any person to do that thing;

(b) engages with one or more other person or persons in any conspiracy for the doing of E that thing, if an act or illegal omission takes place in pursuance of the conspiracy, and in order to the doing of that thing; or

(c) intentionally aids, by any act or illegal omission, the doing of that thing.

[47] The defence contention that the abetment charges should be amended from F s 109 to s 107 is indeed unsustainable. A careful reading of these two sections clearly shows that each and every circumstance contained in s 107 as constituting abetment has also been incorporated in the explanation to s 109. Section 109 and the explanation thereto must be read as a whole i.e. in conjunction and not in isolation. There can be no question of amending the abetment charges from s 109 to s 107 G when these two sections refer to identical circumstances.

[48] The amendment raised in the defence contention, if sustained, would have resulted in the accused not being informed of the punishment under s 109. That would have deprived the second appellant of the opportunity of knowing fully the maximum sentence provided for the offences with which he has been charged, H and certainly would have run counter to the fundamental rules of natural justice.

[49] I hold that the abetment charges under s 109 are flawless and proper. They require no amendment at all.

I EVIDENCE OF ABETMENT

[50] It was canvassed for the second appellant that apart from the evidence that the monies have been delivered to the second appellant's bank account, there was nothing to incriminate him since photocopies of the invoices were not admissible.

[51] The learned deputy responded that the second appellant was the maker of these invoices. A

[52] In my judgment, the substance of the defence contention may be ascertained by revisiting the concurrent finding of facts by both the courts below.

B

[53] The second appellant had provided the first appellant with invoices bearing the letterhead of the used car company of which the second appellant was the sole proprietor. As the second appellant was the maker and author of these invoices, they are clearly admissible.

C

[54] The purpose of the invoices was to secure hire purchase loans from Hong Leong Finance. There is overwhelming evidence of abetment, in that the second appellant by making and providing these invoices has intentionally aided the first appellant in the commission of the offences of cheating. The second appellant's conduct clearly comes within the ambit of abetment as defined in s 107(c) and also the third limb of the explanation to s 109. D

[55] In relation to his own invoices, the second appellant had not even made a feeble attempt to cross-examine prosecution witnesses especially PW3. This would amount to an acceptance of their testimonies, see *Wong Swee Chin*. The second appellant cannot now be heard to say that these invoices issued by him are inadmissible. I am of the view that this defence contention has been correctly dismissed by both the courts below. E

CONCURRENT FINDING

F

[56] It is abundantly clear to me that these appeals are essentially against the concurrent factual finding of both the courts below based on evidence adduced at the trial. Save in exceptional circumstances eg, where the finding of facts is plainly against the weight of evidence, or the inference of secondary facts is unreasonable or illogical thereby warranting appellate interference, an appellate court is slow in disturbing the concurrent finding, see eg, *Public Prosecutor v Munusamy* [1980] 2 MLJ 133, p 136 left I FC per Hashim Yeop Sani J (later CJ (Malaya)); *DP Vijandran v Public Prosecutor* [1999] 1 MLJ 385 CA per Gopal Sri Ram JCA; and *Public Prosecutor v Lawrence Tan Hui Seng* [1993] 4 CLJ 221, p 226f per Edgar Joseph Jr SCJ (as he then was). G

CONVICTIONS H

[57] On the foregoing grounds, both the appeals against convictions are hereby dismissed.

SENTENCES I

[58] It was pleaded on behalf of the first appellant that he was a businessman by profession and a first offender, in which case the sentences imposed on him, as adumbrated at the outset of this judgment, were excessive.

[59] There was no appeal by the second appellant against the sentences meted out against him. There was no cross-appeal by the prosecution on ground of inadequacy of sentences. The prosecution however urged this court to affirm these sentences.

[60] I am unable to find any merit in the first appellant's appeal against the aforesaid sentences. The process of sentencing involves an exercise of judicial discretion by the trial judge, having regard to the facts and circumstances prevailing in each particular case. In the absence of any unauthorized, extraneous or irrelevant exercise of discretion by both the courts below, this court should be slow and indeed should refrain from disturbing the aforesaid sentences (see eg, *Bhandulananda Jayatilake v Public Prosecutor* [1982] MLJ 83, p 84 (FC) and *Datuk Sahar bin Arpan v Public Prosecutor* [2007] 1 MLJ 697, pp 710–711).

[61] The first appellant's appeal against the sentences meted out against him is dismissed. In the circumstances, all the aforesaid sentences against both the appellants are hereby affirmed.

[62] My learned brothers Tengku Baharudin Shah and Raus Sharif JJCA have read this judgment in draft and expressed their agreement with it.

Appeal dismissed with costs.

Reported by Loo Lai Mee